

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 17834 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

KISHORBHAI LILADHAR KAKKAD - Petitioner(s)

Versus

BABUBHAI JIVABHAI & 4 - Respondent(s)

Appearance :

MR ASHISH M DAGLI for Petitioner(s) : 1,

MR RC KAKKAD for Respondent(s) : 1 - 3.

None for Respondent(s) : 4,

NOTICE SERVED for Respondent(s) : 4.2.1, 4.2.2,

4.2.3, 4.2.4, 4.2.5, 4.2.6,4.2.8

MR VIREN G DAVE for Respondent(s) : 4.2.7

MR DD CHUDASAMA for Respondent(s) : 4.2.7

NOTICE SERVED BY DS for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 28/12/2006

ORAL JUDGMENT

1. The petitioner – original applicant has filed this petition under Article-227 of the Constitution of India, praying for quashing and setting aside the impugned order below application Ex.91 in Civil Misc. Appeal No.25 of 1998 dated 19.4.2003 and further consequential order below an application Ex.98 dated 8.7.2005 passed by the learned Civil Judge, Junagadh.

2. This Court has issued notice on 2.9.2005 for final disposal. Pending, hearing and final disposal, orders under challenge were suspended. The Court has also directed to serve the respondent by Speed Post at the

cost of petitioner. The Court, thereafter, issued rule on 4.7.2006. The Court has further observed that since the notice was issued for final disposal rule was not required to be served upon the respondent.

3. The petitioner's case is that the petitioner has preferred an application seeking probate under the provisions of Indian Successions Act before the learned Civil Judge (S.D.) Junagadh being Civil Misc. Appeal No.25 of 1998. While the said application was drafted and presented to the Court, in para-6 of the said application it was stated that the deceased Liladharbhai has by registered will dated 18.3.1996 given all properties. As a matter of fact, mistake was committed in mentioning name of Liladharbhai as actually it was to be typed as Girdharbhai. In para-7 of the said application it was stated that the will was made by Girdharbhai and as he passed away on

4.6.1997, the will which was made on 18.3.1997 and registered at the office of Registrar a prayer was made that the Probate of the will of deceased Girdharbhai may be issued in favour of the petitioner. Alongwith the said application death certificate of Girdharbhai was attached. Since there was typographical mistake in the said application and instead of Girdharbhai it was typed as Liladharbhai, an application was made to rectify the said mistake. The said application came to be rejected by the learned Civil Judge on 19.4.2003 mainly on the ground that the public notice is published and therefore correction may not be permitted.

4. The present petitioner has, thereafter, moved another application at Ex.98 and prayed for rectification of the mistake permitting the petitioner for the same. The said application also came to be rejected on the

ground that since earlier application Ex.91 came to be rejected further application cannot be permitted to be entertained.

5. Mr.Ashish Dagli, learned advocate appearing for the petitioner has submitted that the learned Civil Judge has committed serious error of not permitting the petitioner to rectify the mistake which apparently occurred not on account of any fault on the part of the present petitioner. He has further submitted that inspite of the fact that subsequent application was tendered under Section-151 of Civil Procedure Code and in the event the application came to be allowed it would not prejudice the interest of the respondent, as the petitioner would also abide by all other terms and conditions which may be imposed by this Court in the event of allowing the application. He has further submitted that the ground assigned by the learned Judge would not come in the way

of this Court for exercising the powers under Section-151 of the Code of Civil Procedure and also for doing substantial justice. He has further submitted that if the petitioner is permitted to rectify his own mistake it would not in any way cause injustice or prejudice to the respondents and hence in the interest of justice the petitioner would be allowed to rectify the said mistake.

6. Mr.R.C.Kakkad, learned advocate appearing for the respondent Nos.1 to 3 has strongly objected to grant the prayer made in the present petition. He has submitted that the present petition is not maintainable in view of the fact that the petitioner has challenged both the orders passed below applications Ex.91 as well as 98. Both these orders cannot be challenged in one petition. He has further submitted that the first application was rightly rejected by the learned Civil Judge as the notice was already

published in the newspaper and once the advertisement is published the petitioner is not allowed to rectify the same mistake. He has further submitted that the second application moved by the petitioner is also rightly rejected by the learned trial Judge as it is barred by principle of res judicata. He has, therefore, submitted that no indulgence is required to be shown by this Court while exercising its powers under Article-227 of the Constitution of India.

7. Mr.Viren G. Dave, learned advocate appearing for the respondent No.4/7 has raised the same objections and adopted the arguments of Mr.Kakkad.

8. After having heard the learned advocates appearing for the respective parties and after having gone through the impugned order as well as the averments made in the petition, the Court is of the view that

technically Mr.Kakkad is right to the effect that the petitioner should have filed two separate petitions if the petitioner desired to challenge both these orders. However, the Court is supposed to render substantial justice in the matter. While going through both these applications and the order passed therein the Court is of the view that there was genuine and bonafide technical mistake committed by the petitioner in mentioning the name of Liladharbhai instead of Girdharbhai. The same mistake was also crept in while issuing the public advertisement. Despite this mistake, the objectors raised their objections. If this mistake is sought to be rectified, the learned Civil Judge should have passed an order permitting the petitioner to rectify the said mistake. The petitioner in the second application has shown his willingness to issue the fresh advertisement. Despite this fact, the second application was not entertained on the ground

that the principle of res judicata would be violated if both these orders are allowed to be challenged in the present petition. The Court is of the view that if the mistake is allowed to be rectified it would not cause any prejudice or injustice to any of the parties, hence in the interest of justice, the petitioner is permitted to correct the mistake which was crept in the application and the name of Liladharbhai is allowed to be substituted by the name of Girdharbhai. However, the petitioner is directed to issue fresh advertisement in 'Sandesh Newspaper', having circulation in the region in which earlier advertisement was issued, mentioning the correct name of Girdharbhai and the same format of advertisement which was adopted earlier, should be adopted while issuing this fresh advertisement in the newspaper. Pursuant to this advertisement, it is open for the parties to raise their objections against issuance of the probate of the will

as sought for. Moreover, because of the mistake committed by the petitioner the respondents have to appear in the Civil Court and even before this Court and have to engage advocate to make the submissions. The Court is therefore of the view that by way of nominal cost, an amount of Rs.500/- to each of the respondents, who appeared through their advocate before this Court is to be awarded to them. The petitioner is directed to deposit the cost of Rs.500/- each with the trial Court for the respondents Nos.1 to 3 and No.4/7 who are represented through their advocates before this Court.

9. With the aforesaid observations and directions this petition is accordingly allowed. Rule is made absolute to the above extent. Direct service is permitted.

(K. A. PUJ, J.)

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